



No. S-128066
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
Civil Forfeiture Action *in Rem* Against

The Lands and Structures situated at 3598 East Georgia Street, Vancouver, British Columbia and having a Legal Description of Parcel Identifier 006-718-230, Lot 16, Block 88, Plan VAP2813, Part S1/2, District Lot THSL, New Westminster Land District, as appropriate and the Proceeds therefrom (the "East End HAMC Clubhouse") and the Lands and Structures situated at 837 Ellis Street, Kelowna, British Columbia and having a Legal Description of Parcel Identifier 004-212-690, Lot 14, Block 8, District Lot 9, Osoyoos Division, Yale District, Plan 1306, as appropriate and the Proceeds therefrom (the "Kelowna HAMC Clubhouse") (collectively, the "Properties")

BETWEEN:

DIRECTOR OF CIVIL FORFEITURE

PLAINTIFF

AND:

THE OWNERS AND ALL OTHERS INTERESTED IN THE PROPERTIES, IN PARTICULAR JEAN JOSEPH VIOLETTE also known as JEAN VIOLETTE, RONALD BARRY CAMERON, JOHN PETER BRYCE, MITCHELL KENNETH RILEY, MICHAEL MITCHELL, STANLEY THOMAS GILLIS, KELLY ARTHUR SCHOFIELD, MICHAEL JOHN CHRISTIANSEN, JOHN VIRGIL PUNKO, KIM BLAKE HARMER, HANS FREDERICK KURTH, JOSEPH BRUCE SKREPTAK, LESTER JONES, DAVID FRANCIS GILES, RICHARD CHRISTIAN GOLDAMMER, ROBERT LEONARD THOMAS, NORMAN ROBERT COCKS, MICHAL ZDENEK ZIKMUND also known as MICHAL ZIKMUND, BRIAN MONTGOMERY OLDHAM, GREG STEVEN HOLOMAY also known as GREY STEVEN HOLOMAY and DAMIANO DI POPOLO

DEFENDANTS

COUNTERCLAIM

Filed by: Kelly Arthur Schofield, Mitchell Kenneth Riley, Michael Mitchell, John Peter Bryce, Stanley Thomas Gillis, Kim Blake Harmer and Ronald Barry Cameron (the "defendants")

To: Director of Civil Forfeiture
The Attorney General of British Columbia

This action has been brought by the plaintiff against the defendants for the relief set out in the notice of civil claim filed in this action.

TAKE NOTICE that the defendants Kelly Arthur Schofield, Mitchell Kenneth Riley, Michael Mitchell, John Peter Bryce, Stanley Thomas Gillis, Kim Blake Harmer and Ronald Barry Cameron claim against you for the relief set out in Part 2 below.

IF YOU INTEND TO RESPOND to the claim made against you in this counterclaim, or if you have a set-off or counterclaim that you wish to have taken into account at the trial, YOU MUST FILE a response to counterclaim in Form 4 in the above-named registry of this court within the time for response to counterclaim described below and SERVE a copy of the filed response to counterclaim on the address for service of the defendants bringing this counterclaim.

YOU OR YOUR LAWYER may file the response to counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to counterclaim within the time for response to counterclaim described below.

Time for response to counterclaim

A response to counterclaim must be filed and served on the defendants bringing this counterclaim,

- (a) if you were served with the counterclaim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the counterclaim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the counterclaim anywhere else, within 49 days after that service, or
- (d) if the time for response to counterclaim has been set by order of the court, within that time.

CLAIM OF THE DEFENDANTS BRINGING THE COUNTERCLAIM

Part 1: STATEMENT OF FACTS

1. Beginning in or around June, 2003, E Division of the Royal Canadian Mounted Police conducted Project Essen B, which became Project E Pandora. It was an investigation into the operations of the East End Chapter of the Hells Angels Motorcycle Club. One of the aims of the investigation was to establish that the East End Chapter of the Hells Angels meets the definition of a "criminal organization" as that term is defined in s. 467.1 of the *Criminal Code*.
2. Project E Pandora involved various surveillance techniques including a paid undercover civilian agent and the wiretapping of numerous locations and individuals pursuant to a series of authorizations under s. 185 of the *Criminal Code*.
3. In July 2005, the police searched the East End HAMC Clubhouse and seized a number of items located in the East End HAMC Clubhouse.

4. The police investigation, surveillance, wiretap and search resulted in a report to Crown Counsel ("RCC") which ultimately led to a number of criminal and drug offence charges and convictions in and around 2005.
5. Project E Pandora formally ended in or around 2012.
6. All individuals charged under s. 467.12 of the *Criminal Code* were acquitted on that count.

The Pleadings to Date

7. The *Civil Forfeiture Act*, S.B.C. 2005, c. 29 ("CFA") was assented to on November 24, 2005.
8. Pursuant to s. 22 of the *CFA*, the office of the Director of Civil Forfeiture (the "Director") initially receives information, including documents, from various police agencies on a referral basis, including from the RCMP pursuant to an information-sharing agreement between the Government of Canada and the Province of British Columbia.
9. In November 2012, the Province of British Columbia, through the Director, commenced a forfeiture action under the *CFA* claiming the forfeiture of the East End HAMC Clubhouse.
10. The notice of civil claim seeks, *inter alia*, an order forfeiting all or a portion of the East End HAMC Clubhouse and the fruits or proceeds thereof to Her Majesty in right of the Province of British Columbia as well as orders forfeiting the contents of the East End HAMC Clubhouse.
11. The notice of civil claim alleges that the HAMC is a criminal organization within the meaning of s. 467.1 of the *Criminal Code*.
12. The notice of civil claim names as defendants certain members of the East End HAMC.
13. The notice of civil claim alleges that the East End HAMC Clubhouse or its contents are not only the proceeds of unlawful activity but the instrument of unlawful activity which it further alleges includes the following crimes:
 - a. the production of, possession of, importing/exporting of and/or trafficking in controlled substances, including, but not limited to cocaine, marihuana, methamphetamine;
 - b. committing assaults which caused serious bodily harm to a person;
 - c. committing extortions;
 - d. committing the offence of uttering threats;
 - e. committing manslaughter or murder;

- f. trafficking in controlled substances contrary to the *CDSA*, including, but not limited to, cocaine;
- g. committing possession of restricted and/or prohibited firearms and other weapons offences;
- h. conspiring to commit, aiding and/or abetting any of the above; and
- i. committing, directing or instructing any of the above for the benefit of one or more criminal organizations,

all of which do or are intended to result in the acquisition of property or cause serious bodily harm to a person

- 14. The notice of civil claim alleges that the East End HAMC Clubhouse has been used and will likely continue to be used to engage in unlawful activities for the benefit of, in association with, at the direction of, or to enhance the ability of a criminal organization to commit indictable offences by:
 - a. serving as a symbol to facilitate the commission of unlawful activities;
 - b. by providing a safe place for groups of 3 or more to conspire to commit unlawful activities; and
 - c. being a place where members can commit unlawful activities in secret.
- 15. The Crown has placed a restraint on the East End HAMC Clubhouse pursuant to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, which came out of the E Pandora investigation. This restraint has never been removed despite the fact that no order of forfeiture has been made under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and no proceedings are currently being pursued.

Other Facts and Circumstances

- 16. The *CFA* has as its purpose and its practical operation and effect the Director working closely with other law enforcement personnel engaged in the investigation of criminal activity in order to identify and collect evidence to be used to prove the commission of criminal activity.
- 17. The *CFA* enables the Director to prove such crimes on the balance of probability and to compel those alleged to have committed such crimes to testify in pre-trial or trial proceedings and to incriminate themselves.
- 18. The *CFA* is often resorted to where the evidence collected through the machinery of the criminal law is or would not be admissible in the context of a criminal prosecution but where the Director argues can be admitted in a civil case.

19. The *CFA* is often resorted to where the usual criminal process has failed to provide the Crown with sufficient evidence upon which to proceed with criminal charges and as a substitute for the criminal process and all of its safeguards.
20. On other occasions, the *CFA* is resorted to even where the available evidence meets the Crown's charge assessment criteria that there is a substantial likelihood of conviction under the *Criminal Code* and yet for tactical or strategic reasons, charges are not laid.
21. In other respects, the *CFA* is resorted to even where there has been a conviction for certain crimes but no forfeiture order is sought or obtained under the *Criminal Code*. The *CFA* thus places into question the finality of the criminal process. The continued threat of a civil forfeiture procedure lingering post-conviction will complicate and compromise plea bargaining.
22. The *CFA* requires the Director to pay all cash forfeited to the government under the *CFA*, all proceeds resulting from the disposition of property or the whole or a portion of an interest in property forfeited to the government under the *CFA* and all money paid to the government in settlement of an application or action under the *CFA* into the civil forfeiture account. Under the *Regulations*, the Director may make payments out of that account to compensate a government, including an agent of the government, that provided support to the Director or co-operated with the Director in the forfeiture of property or an interest in property under the *CFA*.
23. In the within proceeding, the Province of British Columbia, through the Director, seeks forfeiture of, among other things, property that it identifies as the Kelowna HAMC Clubhouse.
24. In November 2007, the Province of British Columbia, through the Director, commenced a forfeiture action under the *CFA* claiming the forfeiture of, among other things, property that it identifies as the Nanaimo HAMC Clubhouse. The basis of that action was a lengthy police investigation called Project Halo which spanned 2001-2003. Despite wiretapping and a search of the property no charges were pursued in Nanaimo. Nevertheless, the Director's claim in the Nanaimo case is substantially similar to this one.

Part 2: RELIEF SOUGHT

1. A declaration that the provisions of the *CFA* insofar as they apply to "instruments of unlawful activity" are of no force and effect and *ultra vires* the legislative authority of the Province of British Columbia.
2. A declaration that the provisions of the *CFA* insofar as they apply to "instruments of unlawful activity" are of no force and effect because they unjustifiably infringe s. 7 and/or s. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.
3. A permanent injunction staying this action.

4. An interim or interlocutory injunction staying this action until the counterclaim is heard and finally decided.
5. Costs, including special costs.
6. Such further and other relief as to this Court may seem just.

Part 3: LEGAL BASIS

Division of Powers

1. Unlike its application to proceeds of unlawful activity, when the *CFA* is used in relation to instruments of unlawful activity, the Director must prove a causal connection between the property sought and a specific alleged unlawful act.
2. "Instruments of unlawful activity" include offences proscribed under the *Criminal Code* and other federal statutes ("instruments of crime").
3. The *CFA* and, in particular, in its application to "instruments of crime" is a law in relation to criminal law and procedure in criminal matters, a subject over which exclusive legislative authority rests with the Parliament of Canada, pursuant to s. 91(27) of the *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, and also offends the "implied bill of rights" as enshrined in the *Constitution Act, 1867*.

Charter of Rights and Freedoms

4. The provisions of the *CFA* insofar as they apply to "instruments of unlawful activity" unjustifiably infringes ss. 7 and 11(d) of the *Charter*.
5. Sections 7 and 11(d) of the *Charter* guarantee not only a right against self-incrimination, but ensures the right to be presumed innocent, to have the Crown prove its case beyond a reasonable doubt and to be protected from the stigma and social consequences of criminal or quasi-criminal liability.
6. The provisions of the *CFA* are not immune from *Charter* scrutiny simply because they do not involve the formal laying of charges or the threat of imprisonment when they are in substance of a penal nature.

Address for service of the defendants bringing this counterclaim: Arvay Finlay
1320-355 Burrard Street
Vancouver BC V6C 2G8

Fax number address for service (if any): 1.888.575.3281

Email address for service (if any): jarvay@arvayfinlay.com

The address of the registry is:

800 Smithe Street, Vancouver BC, V6Z 2C5

Dated: 07 Oct 2013

"Joseph J. Arvay QC"

Signature of lawyer for filing parties

JOSEPH J. ARVAY, Q.C.

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.